HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 417 OF 2005.

Smt. Dina Vipul Shah.
an Indian Inhabitant,
R/at: 3rd Floor, 9,
Chowpatty Road,
MUMBAI. 400 007. ..Petitioner.
(Wife of Detenu.)
Vipul Viond Shah. ..Detenu.

Versus.

1. The State of Maharashtra
Through: The Secretary to the
Govt. of Maharashtra,
Home Deptt (Spl), Mantralaya,
MUMBAI - 32.

2. Smt. Neela Satyanarayana,
The Principal Secretary,
(Appeals & Security)
Govt. of Mah., Home Deptt,
(Spl) Mantralaya, Mumbai - 32.

3. The Suprintendent of Prison,
The Mumbai Central Prison,
Arthur Road, Mumbai.

4. The Suprintendent of Prison,
The Nashik Road Central Prison,
Nashik Road, Maharashtra. ..Respondents.

Mr. Maqsood Khan for the petitioner.
Mr. Satish R. Borulkar, PP with Mr. D.S.Mhaispurkar,
APP for the State-respondents.

CORAM: S.B.MHASE &
S.R.SATHE JJ

DATE: AUGUST 22, 2005.

ORAL JUDGMENT (PER S.B.MHASE,J.)

1. The Petitioner - Dina Shah is the wife of the

detenu - Vipul Vinod Shah. The Petitioner has approached this Court invoking the extra-ordinary writ jurisdiction of this court under Article 226 of the Constitution of India for issuance of the writ of habeas corpus for quashing and setting aside the order of detention dated 31st January 2005 passed by the Principal Secretary, (Appeals & Security) Government of Maharashtra, Home Department and Detaining Authority, invoking the powers under Section 3(1) of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 read with Conservation of Foreign Exchange & Prevention of Smuggling Activities (Maharashtra Conditions of Detention) Order, 1974 and Government Order, Home Department No. SB.III/ISA-3974(V) dated 18th December 1974. The Petitioner has approached to this Court challenging the said order of detention on several grounds. But the petition can be disposed off only on one ground, as raised by the Petitioner as Ground No. (XV) in the Grounds of Challenge in Petition. The said ground raised in the Petition reads as follows:

> "(XV) The Petitioner says and submits that the detenu is submitting a Representation jointly addressed to the detaining authority, the State Government, the Central Government

> and the State Advisory Board. The Petitioner says and submits on this petition being admitted and Rule-Nisi being issued, it would be incumbent upon the detaining authority and the State Government to disclose to this Hon'ble Court as to whether the said Representation submitted by the detenu was expeditiously considered by the detaining authority and the State Government independent of each other and uninfluenced by the opinion of the Board and as to whether their replies were forwarded to the detenu and served on the detenu without any loss of time. The Petitioner says and submits that on the failure of the Detaining Authority and the State Government and to satisfy this Hon'ble Court on the aforesaid counts, the detention of the detenu be held as violative of Article 22(5) of the Constitution and as such mala fide, null and void."

2. The reply affidavit of the detaining authority - Neela Satyanarayana, Principal Secretary (Appeals & Security), Government of Maharashtra, Home Department, Mantralaya, Mumbai - 32 has been filed in this court on 21st June 2005. In paragraph 20 of the said affidavit, the ground No. XV of the Grounds of Challenge in the Petition has been answered as follows:

> 20. With reference to para 5(xv) of the petition, it is submitted that the representation dated 12.2.2005, was addressed to the Principal Secretary (A & S) and Additional Chief Secretary (Home) jointly was received in the office on 16.2.2005, thereafter on

17.2.2005 parawise comments on the said representation was called from Sponsoring Authority. The Sponsoring Authority forwarded parawise comments on 21.2.2005 which was received on the same day. Thereafter, the concerned Assistant prepared a detail note on 23.2.2005 and forwarded it to the Under Secretary on the same day. The Under Secretary after his careful consideration endorsed it on 23.2.2005 and forwarded it to the Deputy Secretary on the same day. The Deputy Secretary after his careful consideration vide his endorsement dated 23.2.2005 suggested for calling further comments from the Sponsoring Authority and forwarded the papers to me and I gave my endorsement and approved the suggestion for calling further parawise comments on 23.2.2005. Thereafter, the letter was sent to the Sponsoring Authority on 24.2.2005 which was received by them on 25.2.2005 and further comments were forwarded by them on 1.3.2005.

. I state that in the mean time the detenu had preferred another representation dated 25.2.2005 through Jail requesting for transfer from Nashik Road Central Prison to Mumbai Central Prison, Mumbai which was received on 28.2.2005 hence the files were in transit for processing the said representation. IN respect of the said representation parawise comments were called fro vide letter dated 2.3.2005 from Jail Authority. The parawise comments were received on 7.3.2005 vide letter dated 5.3.2005. It is submitted that the said parawise comments were received in the Cofeposa Cell on 10.3.2005 as during the said period 8.3.2005 was closed holiday. Thereafter, the concerned Assistant prepared the detail note on 11.3.2005 and forwarded it to the Under Secretary on 11.3.2005 and the Under Secretary directed that the representation for

> Jail transfer be referred to ACS (Home) for his consideration and the representation dated 12.3.2005 was directed to forward to the Deputy Secretary and who gave his endorsement on 11.3.2005 and forwarded the papers to the Deputy Secretary, who gave his endorsement on 14.3.2005 and forwarded the papers to me and I after carefully and independently considering the representation rejected the same on 15.3.2005. I say that the rejection reply was sent on the same day and which was served upon the detenu in Nashik Road Central Prison, Nasik, on 16.3.2005."

3. Pointing out this material from the petition and affidavit, learned counsel for the Petitioner Mr. Maqsood Khan submitted that the representation submitted on 12.2.2005, in respect of revocation of the detention order has not been expeditiously and diligently considered by the Detaining Authority. He pointed out that on reading paragraph No. 20 of the reply-affidavit it will reveal that the representation with the remarks of the Sponsoring Authority on back reference have been received by the Detaining Authority on 1.3.2005, however, the representation was rejected on 15.3.2005 and it was communicated to the detenu on 16.3.2005. The learned counsel for the Petitioner Mr. Maqsood Khan submitted that the Detaining Authority has not explained as to why the decision was not taken on the representation of the petitioner from 1.3.2005 till

15.3.2005. He further submitted that the explanation offered in paragraph 20 of the reply affidavit that "files were in transit because of the second representation dated 25.2.2005" is a false one.

4. The learned Public Prosecutor Mr. Borulkar appearing for the respondent - Detaining Authority submitted that after receipt of the first representation on 12.2.2005, the detaining authority has received a second representation on 25.2.2005 and the said representation was also processed. He submitted that therefore the decision in respect of the first representation could not be taken till 15.3.2005. He relied upon **1991 CRI.L.J.790 in the matter of K. M. Abdulla and Ano. v/s. Union of India & Ors.** and submitted that the words "as soon as may be" occurring in clause (5) of Article 22 of the Constitution of India reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the concerned detention law, within which the representation

should be dealt with.

. He also invited our attention to paragraph 16 and pointed out that the time imperative for consideration of representation can never be absolute or obsessive. It depends upon the necessities and the time at which the representation is made. Thus, he tried to persuade us that the representation has been properly rejected on 15.3.2005 and, therefore there is no delay, latches or lack of diligence on the part of the detaining authority in disposing off the representation made by the detenu.

5. It is to be noted that the representation dated 12.2.2005 made by the detenu was in respect of the revocation of the detention order. As against this the representation dated 25.2.2005 has nothing to do with the first representation; because by the second representation dated 25.2.2005, the detenu has requested for transfer of a detenu from Nashik Central Prison to Mumbai Central Prison. It is further to be noted that the decision on a representation dated 12.2.2005 is to be taken by the detaining authority whereas the decision on representation dated 25.2.2005 is to be and has been taken by the Additional Chief Secretary (Home). This

will reveal that the authorities who were expected to consider these representations were different authorities. If these facts are taken into background, then it becomes evident from the affidavit of the detaining authority that on 1.3.2005 all the files with the remarks on back reference were with the detaining authority and the detaining authority was in a position to take a decision in respect of the representation as to whether the detention order is to be revoked or not to be revoked. It was not necessary for the detaining authority to wait for the processing of the another representation, since it was to be decided by the different authority, namely, Additional Chief Secretary, Home Department. It is further to be noted that even assuming for a moment that both the representations were to be considered by the detaining authority still the first representation dated 12.2.2005 is in respect of the revocation of the detention order, as against this the second representation was in respect of the transfer of the detenu from one jail to another. Therefore, these two representations cannot be enter-mixed. One of the explanations offered is that in view of the second representation, the files were in transit for processing the said second representation. It is to be noted that on Second Representation remarks are to be called from

the Jail Authority and not from the Sponsoring Authority. We called upon Mr. Borulkar, learned PP to point out from the original record that actually the files were in transit as stated in the affidavit. However, the learned APP was not in a position to point out from the record that the files were in transit. Therefore, we hold that for considering the representation for transfer of the detenu from one jail to another jail the files were not in transit and not only that the detaining authority was also not the decision taking authority for that, because admittedly in respect of the rejection of the second representation the order was passed by the Additional Chief Secretary (Home).

6. Thus, it becomes crystal clear that the explanation given by the authority for not taking decision on the representation dated 12.2.2005, even though the remarks were received from the Sponsoring Authority on 1.3.2005 till 15.3.2005 is unexplained and not only that, but the false or incorrect explanation has been offered by the detaining authority. We find that the representation dated 12.2.2005 has not been expeditiously and diligently disposed off by the detaining authority. The case which is relied upon by

the learned counsel for the respondent - State does not help them. On the contrary, the paragraph No. 12 of the said judgment (supra) is to the following effect:

> "12. The representation relates to the liberty of the individual, the highly cherished right enshrined in Article 21 of our Constitution. Clause (5) of Article 22 therefore, casts a legal obligation on the Government to consider the representation as early as possible. It is a constitutional mandate commanding the concerned authority to whom the detenu submits his representation to consider the representation and dispose of the same as expeditiously as possible. The words "as soon as may be" occurring in Clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts

> and circumstances of each case. There is no period prescribed either under the Constitution or under the concerned detention law, within which the representation should be dealt with. The requirement however, is that there should not be supine indifference slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and illegal. This has been emphasised and re-emphasised by a series of decisions of this Court."

. On reading the said paragraph, it will be clear that the requirement is that there should not be supine indifference, slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it is impermissible and illegal.

7. Learned counsel tried to take advantage of

paragraph 16 of the said judgment. However, we are afraid to understand how paragraph 16 of the said judgment helps the case of the respondent - State, because paragraph 16 contemplates exigency wherein the detaining authority has made out the case that there may not be time to dispose of the representation before referring the case to the Advisory Board. All these circumstances under which the observations have been made in paragraph 16 are not the subject matter of consideration before this court. Paragraph 16 is inapplicable to the facts and circumstances of the present case, as can be evidenced from the grounds of challenge in the Petition and the reply quoted above.

8. Thus, under these circumstances, we find that the right of the detenu to make a representation under Article 22(5) of the Constitution of India - of affording him the earliest opportunity to make a representation against the order, has been violated by the detaining authority.

9. At this stage, the learned PP for the State - Mr. Borulkar submitted that the order of detention may not be quashed and set aside, and instead the continued detention may be quashed and set aside. Mr. Maqsood

Khan, learned counsel for the Petitioner submitted that this is the settled position of law and his purpose will be satisfied if the continued detention is quashed and set aside. In view of the above discussion, we pass the following order.

O R D E R.

1. The Petition is partly allowed.

2. The continued detention of the detenu - Vipul Vinod Shah on the basis of order bearing No. PSA 1104/25(1)/SPL-3(A) dated 31st January 2005 passed by the Principal Secretary (Appeals & Security), Government of Maharashtra, Home Department & Detaining Authority is hereby quashed and set aside.

3. The detenu be released forthwith, if not required in any other case.

4. Rule is made absolute accordingly

(S.R.SATHE,J.) **(S.B.MHASE, J.)**

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